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SHOULD WE REALLY BLAME THE LAWYERS?

DONALD E. CORDOVA*

The readers of this less-than-scholarly article have undoubtedly heard the radio advertisements paid for by the Colorado Trial Lawyers Association proclaiming that lawyers are not to blame for the "medical malpractice crisis." These very clever ads conclude that the true blame for high premium costs for professional liability insurance should be placed in the lap of the insurance industry and that the crisis is manufactured by it to hide poor investments. The insurance industry of course, blames not itself, but the escalating number of claims, costs incurred in defending these claims, and high jury awards. It claims there truly is a crisis and has asked the legislature to help.

Some facts are undisputable whether one characterizes the issue as a medical malpractice crisis, hysteria, or insurance industry misrepresentation. These facts are: (a) increased premiums for professional liability insurance charged to the physicians; (b) increased costs for medical services passed on to the patient; (c) physicians quitting the practice of medicine because of increased premiums; and (d) limited availability of insurance coverage.

There are no easy solutions to this multi-faceted problem. Lost in all of the finger-pointing between the two protagonists are the respective roles played by the State, the physician as the provider, the patient, the attorney, the medical expert, and the jury. Space does not permit an in-depth analysis of each of these roles. Therefore, the focus will be on the role played by only some of the participants, which will by necessity, be general in scope.

Medical litigation begins with a dissatisfied patient who has incurred an injury (real or imagined) at the hands of a physician. The patient has been told by someone to see an attorney about his problem. Some lawyers advertise their services and some of these ads are very suggestive and may very well encourage litigation. However, many patients find an attorney through a referral from a friend or relative. Some have read about large jury awards, some have staggering medical bills, some are greedy, some have been treated rudely by their doctors, and many have debilitating injuries. The listed reasons are not intended to be all inclusive.

The treating physician's "bedside manner" causes many patients to seek legal advice. An all too common complaint is that the physician refuses to discuss medical matters with the patient. In many instances, a few extra minutes of concern, a willingness to talk, and understanding

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on the part of the physician could make the difference in averting a lawsuit. Most people respect their physicians and do not like to sue them. However, patients are no longer willing to quietly accept a bad result as "just one of those things" or as "an act of God." They demand an explanation and should be given one.

Once the decision to sue has been made and the lawsuit filed, a patient may obtain an award against a physician only if he can prove that the medical care rendered was below the standard of care for physicians in the same field of practice and in a similar community. Previously, an expert witness had to be from the same or similar locality in order to be allowed to testify. Today however, courts allow an expert witness to testify as if there were a national standard of care, such as in the case of specialists like obstetrics and gynecology, neurology, etc. It is reasoned that since one has to pass a national examination in order to be board certified, the standard of care for those specialists must be national in scope. This reasoning allows the use of "national experts" in cases tried in Colorado, irrespective of how large or small the community may be where the physician practices.

Patients' attorneys previously claimed that a "conspiracy of silence" existed because they could not find a physician in the community or in the state who was willing to testify against another physician. This is no longer the case. Well-qualified and well-credentialed expert witnesses, many from university hospitals and teaching institutes, have enlisted in the cause of testifying against physicians in medical malpractice claims. Except in rare cases, such as where surgical sponges or instruments are left in the patient or where surgery is done on an incorrect limb, it is necessary for the patient to have an expert witness in order to get his case to the jury. The patient must prove (a) what the standard of care is, (b) a deviation from that standard of care by the physician, and (c) that the deviation was a cause of the plaintiff's injury and damages. Without an expert witness, the patient would be unable to establish any one of the three elements and he would lose his case.

When several expert witnesses are employed by the patient-plaintiff to testify, the defense is forced to line up an equal number of expert witnesses. In a case with several co-defendants, it is not unusual to have ten to twenty designated expert witnesses. Each of these experts will most likely be deposed by one party or the other. This system is terribly time consuming and very expensive. If a case involves small damages, it is more economical to settle the case than to incur the expense of discovery and trial, even if the claim is without merit. This approach is not always beneficial to the physician-defendants and generally meets with their disapproval.

Who benefits from this inefficient system? Clearly the expert witnesses are among the primary beneficiaries. Most of them charge anywhere from a modest \$100 per hour up to \$300-\$400 per hour for their time. The fees are exorbitant and bear no relevance to the worth of that individual or his opinions. It has been the author's experience that uni-

versity professors are most likely to charge exorbitant rates. These rates clearly exceed what they earn as university professors or what they are paid as non-litigation consultants. These experts are generally selected because they have written some article which has been published in some medical journal or because they have previously testified and are experienced witnesses. In most instances, these expert witnesses reside out of state, thus requiring transportation to the deposition site, or as in most cases, that three or four attorneys fly to where the expert resides. Thus the costs of taking depositions are quite high and contribute significantly to the cost of defending these cases.

In summary, it is this author's opinion that legislation which limits the right and amount of the patient's recovery does not provide a viable solution to the problem and may very well be unconstitutional. It is fundamentally unfair to place the burden of resolution only on the injured party. Any attempt at resolving the problem requires that the physicians accept their responsibilities to their patients and re-examine their roles as providers and healers. Also, the physician's role as an expert witness should be viewed with skepticism. Is it an objective standard of care these experts espouse or is it a subjective one? We must ask whether these experts are caught up in defending their research articles and the prestige of the institutions they represent. Finally, we must examine how we can control the proliferation of expert witness depositions and the costs associated with those depositions. We certainly should aspire to a simpler, less expensive means of fact finding.

Are the lawyers really to blame?

